ment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord COKE made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this house to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned lords who heard the case, I do not repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Appeal dismissed with costs.

Concurring opinions were delivered by Lords WATSON and FITZGERALD.[1]

[1] See note to *Goddard* v. *O'Brien*, 21 Am. Law Reg. (N. S.) 639.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

DODD v. JONES.

A contract to assign an insurance policy to the purchaser of the insured property is a contract of sale, and the measure of damages for breach thereof is only that amount necessary to procure a policy for the remainder of the time it had to run, not the value of the house, which burned down while the promisee relied upon the fulfilment of the contract and neglected to insure.

ACTION of contract to recover for the non-assignment of a certain fire insurance policy. The facts appear in the opinion. At the trial below the verdict was for plaintiff in the sum of $5.94, the

amount it would have cost to procure insurance for the unexpired term of the policy. Plaintiff excepted.

A. L. Murray and *D. F. Kimball*, for plaintiff.

E. C. Gilman, for defendant.

The opinion of the court was delivered by

ALLEN, J.—The defendant sold a house to the plaintiff, and agreed to assign to her a policy of insurance he held upon it. He did not assign it, although several times requested by the plaintiff, but promised to do so, and gave some excuse for not having done it. The plaintiff procured no insurance upon the house. Nearly six months after the conveyance of the house to the plaintiff, and about three weeks after the last demand upon the defendant for an assignment, the house was injured by fire.

The plaintiff declares in contract upon the agreement to assign the policy, alleging that it became void by reason of the neglect of the defendant to perform his agreement, and that the plaintiff was deprived of the benefit of the insurance, and seeks to recover the amount that might have been recovered upon the policy for the loss by fire. At the trial the court held that the plaintiff could not recover for damages resulting from the burning of the house, nor for other damages more than it would have cost to procure insurance for the unexpired term of the policy. The instructions given were clearly correct.

The agreement was not a contract of insurance but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy, and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequences of the failure of the defendant to perform his contract would be that the plaintiff would procure another policy of insurance, and she cannot charge the defendant with the consequences of her neglect to do that: *Loker* v. *Damon*, 17 Pick. 284; *Miller* v. *Mariners' Church*, 7 Greenl.

51; *Grindle* v. *Eastern Express Co.*, 67 Me. 317; *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304.

Exceptions overruled.

There is a broad distinction between the measure of damages for a tort and for breach of contract. "The wrongdoer," says Judge SUTHERLAND, (1 Damages 74), "is answerable for all the injurious consequences of his tortious act, which according to the usual course of events and the general experience, were likely to ensue, and which therefore when the act was committed he may reasonably be supposed to have foreseen and anticipated. But for breaches of contract the parties are not chargeable with damages on this principle. Whatever foresight at the time of a breach the defaulting party may have, of the probable consequences, he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach; such as usually occur from the breach of such a contract, and such as were within the contemplation of the parties when the contract was entered into, as likely to result from a breach:" *Hadley* v. *Baxendale*, 9 Exch. 341; *Candee* v. *Western U. Tel. Co.*, 34 Wis. 479.

Thus on failure to give a lease and possession in accordance therewith as agreed, *held*, that damages could not be recovered for injuries to goods packed up and stored to await possession, nor for profits lost while they were so packed and withheld from exposure for sale. This was on the ground that the breach did not necessarily prevent a sale or result in injury by storage in an improper place: *Lowenstein* v. *Chappell*, 30 Barb. 421. See also *Horner* v. *Wood*, 15 Barb. 371; *Cuddy* v. *Major*, 12 Mich. 368; *Masterton* v. *Mayor*, 7 Hill. 61; *Story* v. *N. Y. Railroad Co.*, 6 N. Y. 85; *Bridges* v. *Stickney*, 38 Me. 361; *Barnard* v. *Poor*, 21 Pick. 378; *Fox* v. *Harding*, 7 Cush. 516; *Clare* v. *Maynard*, 6 Ad. & El. 519; *Walker* v. *Moore*, 10 B. & C. 416; *Lawrence* v. *Wardwell*, 6 Barb. 423; *Williams* v. *Reynolds*, 6 B. & S. 493; *Harper* v. *Miller*, 27 Ind. 277; *Walsh* v. *Chicago, &c., Railroad Co.*, 42 Wis. 23; *Brown* v. *C., M. & St. P. Railroad Co.*, Wis. L. News, Feb. 2, 1882; *Griffin* v. *Colver*, 16 N. Y. 489; *Alder* v. *Keighley*, 15 M. & W. 117; *Hammer* v. *Schoenfelder*, 47 Wis. 455; *Messmore* v. *N. Y. S. & L. Co.*, 40 N. Y. 422.

But while one who breaks a contract is not liable for remote or speculative damages, although susceptible of proof, or deducible from his non-performance, he is liable for damages directly resulting from his breach, and which may be contemplated or presumed likely to result therefrom: *Miller* v. *Mariners' Church*, 7 Me. 51; *True* v. *International Tel. Co.*, 60 Me. 9, 25; *Bartlett* v. *W. U. Tel. Co.*, 62 Me. 209. Thus where in consequence of the unreasonable delay of a carrier in delivering plaintiff's account against a third person, it became barred by the Statute of Limitations, the carrier was held liable for the amount of the account: *Favor* v. *Philbrick*, 5 N. H. 358. Where an express company received from plaintiff a promissory note against a third person which they agreed to collect of the maker, but during the company's negligent delay in pressing the collection, the maker failed and the note became worthless, the company were held for the amount of the note: *Knapp* v. *U. S. & C. Ex. Co.*, 55 N. H. 348; *Parks* v. *Alta Cal. Tel. Co.*, 13 Cal. 422; *Bryant* v. *Am. Tel. Co.*, 1 Daly 575. And while the loss of another's money received for transportation by a carrier, without reasonable knowledge of the purpose for which it is sent will lay the carrier under obligation

merely to refund the principal sum with interest; still when it is seasonably sent for the specific purpose of paying the sender's premium on his life policy which will lapse if the money be not paid at the particular time and the carrier is reasonably informed in relation to the premises, and has a reasonable time to perform the duty undertaken, but negligently fails to perform it, the law will justly hold him primarily at least for the net value of the policy which lapsed in consequence of his negligence. From their knowledge of the special circumstances both parties must be presumed to have contemplated such consequences when the money was deposited with the carrier: *Grindle* v. *Eastern Ex. Co.*, 67 Me. 317. But this rule is limited by another. The law makes it incumbent upon a person for whose injury another is responsible, to use ordinary care and take all reasonable measures within his knowledge and power, to avoid the loss and render the consequences as light as may be. It will not permit him to recover for losses that such care and means might have prevented: *Loker* v. *Damon*, 17 Pick. 284; *French* v. *Vining*, 102 Mass. 132; *Eastman* v. *Sanborn*, 3 Allen 594; *Sherman* v. *Fall River I. Works*, 2 Id. 524; *Scott* v. *Boston, &c., Steamboat Co.*, 106 Mass. 468; *Sutherland* v. *Wyer*, 67 Me. 69; *Hamilton* v. *McPherson*, 28 N. Y. 72, 77; *Milton* v. *Hudson R. S. Co.*, 37 Id. 210; *Mather* v. *Butler Co.*, 28 Ia. 253; *Simpson* v. *Keokuk*, 34 Id. 568.

Now, as suggested in the principal case and the *Grindell Cases*, *supra*, some insurance companies are accustomed to reinstate the assured without expense, in case of accidental lapse, especially when the policy has run but a short time. All of them will re-insure on payment of a premium based on increased age, if, on re-examination, the health of the assured remains unimpaired. It is incumbent on the assured to protect himself from loss by procuring reinstatement or reinsurance, if he has a reasonable time and opportunity to do so. Of course, should he die so quickly after the lapse of the policy that he had not a reasonable time or opportunity to protect himself from loss by the lapse, then, probably, the person causing the loss would be liable for the full amount of the policy. These views apply, in substance, to fire as well as life insurance.

Perhaps the most interesting application of the rule that a party injured by breach of contract must use reasonable diligence to protect himself from loss, and can only recover damages for such injury as he can not, by the exercise of reasonable diligence, prevent, is to the case of a broker who buys or sells for a customer stocks or grain upon future delivery, and wrongfully closes out the "deal" to the injury of the customer. For example, a broker buys 100,000 bushels of grain to be delivered to him for his customer within sixty days—whenever called for. The customer keeps his margins good, but the broker wrongfully sells him out. Here the broker has been holding for his customer not an insurance policy, but a contract of sale of grain for future delivery. His agreement with his customer is to hold this contract until the time expires or the customer directs him to dispose of it; providing, of course, that ample margins are deposited. He has wrongfully disposed of that contract, to the loss of his customer's possible profits. What is the measure of damages? The amount of the margins? The value of the grain, or the value of the contract to deliver it?

In Illinois a party employed another to purchase a quantity of grain for him and to advance the money for the purpose, and to sell the same as directed, the former depositing with the latter a sum of money to secure him against loss in advancing the means to make the purchase, in case the price of grain should decline before it was sold. The

party making the purchase did not obey instructions in making the sale of the grain, but sold at a loss. It was decided that the money deposited as an indemnity could be recovered under the common counts in assumpsit; it was not necessary to declare on the special contract which had been violated, as nothing remained to be done under it. The party making the purchase having disobeyed instructions in making the sale, he thereby lost his lien upon the money deposited with him as an indemnity against loss: *Jones* v. *Marks*, 40 Ill. 314. *Oldershaw* v. *Knowles*, 101 Ill. 117, appears to be to the same effect, while in *Denton* v. *Jackson*, 106 Ill. 433, it is decided that in case of a wrongful sale by the broker he will be bound to "make good" the purchaser's loss, and "such purchaser may in such case recover of him the full amount deposited as margins." In each of these cases the action appears to have been assumpsit for money had and received, designed simply to recover the margins, without reference to any possible profits that might have resulted had the "deal" been kept open. It is noteworthy, too, that there is no discussion by the court as to what is the proper measure of damages in either of the cases.

Here the measure of damages is the amount of margins put up. But there are several considerations which make this appear somewhat inequitable. For example, suppose the broker, on behalf of the customer, had agreed to buy 100,000 bushels of wheat, to be delivered in three months, and paid for at one dollar per bushel. Suppose that wheat declines to ninety cents in thirty days, thereby necessitating the customer to put up as margins $10,000, which he does, but is, notwithstanding, "closed out" by his broker. This act of the broker is wrongful, and, according to the foregoing decisions, he is liable to his customer for the $10,000. But suppose that, throughout the remainder of the three months, wheat steadily declines until it reaches seventy-five cents per bushel. This decline would have compelled the customer to "put up" $15,000 more—$25,000, in all—which would have been lost when the time for delivery expired. In such a case as this, the "wrongful" act of the broker would, instead of producing a loss, really work a benefit—a saving of $15,000. Is he, nevertheless, to be mulcted in $10,000 damages? If a rule of damages is sound, that will produce such a result as this, there would seem to be something of truth in the remark of Mephistopheles, in Faust, that "Reason is nonsense; Right, an impudent suggestion." It may be questioned, too, whether money had and received lies in such a case. Chitty writes thus: "But the count for money had and received is not maintainable, if a contract has been in part performed and the plaintiff has derived some benefit, and by recovering a verdict the parties cannot be placed in the exact situation in which they originally were when the contract was entered into:" 1 Pleadings 355. This proposition of law is sustained by the cases of *Hunt* v. *Silk*, 5 East 449, and *Beed* v. *Blandford*, 2 Young & J. 278. Now, in the case supposed, would a judgment for $10,000 —the amount of the margins lost—place the parties *in statu quo*? Clearly it would not; because the broker's contract with his customer to keep the deal open for him has been partly performed. The customer has for thirty days derived the benefit of having control of the property and all possibility of a rise in the market during thirty days' time. The broker would not, by the judgment, be restored to the control of the wheat during the thirty days it was controlled by his customer, nor would any equivalent for the loss of this thirty days' control be given the broker. And if he had had control he could, perhaps, have sold and saved himself from all, or part, at

least, of the loss by the decline. And when the broker "closed out" the "deal" he did not keep the $10,000 margins. They were paid to the other party to the transaction—the man from whom the wheat was bought. If, now, the broker pays the $10,000 judgment against him, instead of being left *in statu quo*, he will have lost a large sum of money. "By recovering a verdict" for $10,000 the parties will by no means "be placed in the exact situation in which they originally were when the contract was entered into." How, then, will the action for money had and received lie, according to Chitty's rule in such a case?

Markham v. *Jaudon* (decided in New York in 1869), 41 N.Y. 235, laid down a different measure of damages. That was a case where the defendants, stock-brokers, at the request of plaintiff, and for him, but in their own names and with their own funds, purchased certain stocks, he depositing with them a "margin" of ten per cent., which was to be "kept good," they "carrying" the stocks for him. It was decided, two judges, GROVER and WOODRUFF, dissenting, that the legal relation created between the parties by this transaction was neeessarily that of pledgor and pledgees, the stock purchased being the property of the plaintiff, and in effect pledged to the defendants as security for the repayment of the advances made by them in the purchase; and that a sale of such stock by them except upon judicial proceedings, or after a demand upon him for the repayment of such advanced and commissions, and a reasonable personal notice to him of their intention to make such sale, in case of default in payment, specifying the time and place of sale, is a wrongful conversion by them of the property of the plaintiff. *Held, further*, that in an action by the plaintiff against defendants for damages on account of such conversion, the proper measure of recovery was the highest market price between the time of the conversion and the trial (citing *Romaine* v. *Allen*, 26 N. Y. 309; *Scott* v. *Rogers*, 31 Id. 676; *Burt* v. *Dutcher*, 34 Id. 493.) This was treating the broker's conduct in the light of a tort rather than as a mere breach of an implied contract to buy certain stocks and hold them for the benefit of the customer so long as the latter should desire, and keep his "margins" good.

Another case giving what appears to be a sounder view of this subject is *Baker* v. *Drake*, 53 N. Y. 211. The New York court had in several cases expressed its willingness to re-examine its ruling in *Markham* v. *Jaudon*, 41 N. Y. 235. In *Mathews* v. *Coe*, 49 N. Y. 57, Judge CHURCH distinctly said that an unqualified rule giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial could not be upheld upon any sound principle of reason or justice, and that the New York court did not regard the rule to be so firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary.

In *Baker* v. *Drake*, stock was bought by defendants, plaintiff putting up margins to secure them from loss. Defendants sold out plaintiff wrongfully, and the lower court awarded as damages the difference between the price at which the stock was sold, and the highest price at which it could have been sold between the time of the actual sale and the trial. Of this sum the court say: "This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the

subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience." *Baker* v. *Drake*, *supra*.

As to what was the proper indemnity the court said: "The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation, except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss. If upon becoming informed of the sale he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale. Would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he had been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done." *Baker* v. *Drake*, 53 N. Y. 217. The court intimated also that this was the proper rule of damages no matter whether the action was on the contract broken or for the tort.

The rule laid down in *Baker* v. *Drake* appears to be reasonable and right. Should it not be applied in cases like those cited in Illinois where it is sought to recover the margins deposited? Its application to such cases would appear to be sustained by the principle so clearly stated by Field (Law of Dam. pp. 19–20). "It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary effort and care, or at a moderate expense, for which effort and expense he may charge the wrongdoer. And where by the use of such means he may prevent loss he can only recover for such loss as could not thus be prevented." And again, p. 131: "The principle applies whether the plaintiff's negligence contributed to the injury, or whether by his subsequent negligence and failure to use reasonable means to prevent the consequences of an injury, the loss is greater than it would otherwise have been. In either case he cannot recover for loss caused by his own fault." Field, Law of Damages, p. 131; see also *Mather* v. *Butler Co.*, 28 Ia. 253; *Simpson* v. *City of*

Keokuk, 34 Id. 253; *Jones* v. *Van Patten*, 3 Ind. 107: *Benton* v. *Fay*, 64 Ill. 417; *Parsons* v. *Sutton*, 66 N. Y. 92; *True* v. *International Tel. Co.*, 60 Me. 9; *Dobbins* v. *Duquid*, 65 Ill. 464, 467.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Kansas.

HUMMER ET AL. *v.* LAMPHEAR.

An action can be maintained on a domestic judgment, although it is in full force and effect, and the time within which an execution can issue has not expired.

ERROR from Jackson County.

Hudson & Tufts, for plaintiff in error.

Martin & Orr, for defendants in error.

HORTON, C. J.—The facts in this case are as follows: On June 17th 1876, the Perpetual Building and Saving Association recovered in the District Court of Atchison county a judgment against John P. and Matilda W. Hummer for the sum of $331.08, bearing interest at nine per cent. per annum. June 6th 1881, an execution was issued upon this judgment. This was returned wholly unsatisfied as to the building and saving association. On September 13th 1882, the judgment was assigned and transferred to A. H. Lamphear, who is now the owner thereof. On September 28th 1882, an *alias* execution was issued upon the judgment, directed to the sheriff of Jackson county, Kansas, and this execution was also returned unsatisfied. On November 24th 1883, A. H. Lamphear brought his action in the District Court of Jackson county against John P. and Matilda W. Hummer, upon the judgment in favor of the building and saving association of June 17th 1876, and alleged in his petition that the judgment was in full force and effect; that John P. and Matilda W. Hummer had no personal property within the state of Kansas subject to execution, nor the legal title to any lands or real estate in said state subject to execution; that Matilda W. Hummer was the owner of an equitable interest in a quarter section of land lying in Jackson county, state of Kansas, the legal title to which was in the state of Kansas, to secure the sum of $676.30, with interest from June 17th 1882, at ten per cent. per annum; that upon payment of this amount and interest, the state was ready and willing to give a deed or patent

conveying the land and the legal title thereto. The prayer of the petition was that judgment should be rendered against J. P. and M. W. Hummer for the sum of $331.08, with interest at nine per cent. per annum, and costs of suit; that the sheriff of Jackson county be appointed a receiver to ascertain the interest of Matilda W. Hummer in the land described in the petition; that he take possession of the same and hold it, with the rents and profits arising therefrom, subject to the order of the court, and for other and further relief as the court might deem meet and proper. The defendants, John P. and Matilda W. Hummer, demurred to the petition upon the grounds: 1st, that the court had no jurisdiction of the persons of the defendants or of the subject of the action; 2d, that the petition did not state facts sufficient to constitute a cause of action against the defendants or either of them. The court overruled the demurrer, and rendered judgment against the defendants for $546.17, with interest and costs, adjudged the same to be a first and prior lien on whatever interest the defendants or either of them had in the real estate described in the petition, and decreed that if the defendants failed or refused to pay the judgment within a day named, an order of sale issue to sell the property to satisfy the same. To the rulings and judgment of the court the defendants excepted. It is their contention at this time that the petition does not state facts sufficient to constitute a cause of action, because, upon its face, it appears that the judgment sued on was, at the commencement of this suit, in full force and effect, and that execution might have issued thereon, and the equitable interest of Matilda W. Hummer in the real estate in Jackson county have been taken by execution: Code, sects. 419, 443; Comp. Laws 1879, c. 104, sect. 1, subd. 8. To support this, it is insisted that at common law an action could not be maintained upon a judgment until the time within which an execution might issue had elapsed: *Pitzer* v. *Russel*, 4 Or. 124; *Lee* v. *Giles*, 1 Bailey 449; 21 Am. Dec. 476; 3 Bl. Com. (Wendell's ed.) 160.

Counsel say in their brief: "There are *dicta* in several decisions which would seem to take a contrary view; but we have been unable to find a case where the question was squarely raised, and the decision was that such an action could be maintained at common law until the judgment became dormant, or the execution would prove ineffectual. * * * *Burnes* v. *Simpson*, 9 Kans. 658, decides that an action can be maintained on a domestic judg-

ment in this state, which is true; but whether it can be maintained when an execution can issue thereon was not raised in that case, and consequently not examined. We claim that case does not decide the question now raised."

The decision in *Burns* v. *Simpson*, *supra*, goes further than counsel are willing to concede. In that case the judgment was rendered June 4th 1859, for $3054 and costs. Executions were issued as follows: September 28th 1859; November 28th 1859; January 27th 1860; August 15th 1864; May 2d 1869. All of these were returned unsatisfied. The action on the judgment was commenced June 2d 1869. Under the law in force at the rendition of the judgment of June 4th 1859, judgments of the District Court were liens for five years on lands, and as long thereafter as judgment should be kept alive by the issue of executions in proper time: Comp. Laws 1862, sects. 433, 434. The judgment of *Burns* v. *Simpson*, of June 4th 1859, was in full force and unsatisfied when the action of June 2d 1869 was instituted, as it had been kept alive by the issue of executions in accordance with the provisions of the statute. Therefore the decision in *Burns* v. *Simpson*, upon the record in that case, decides, in effect, that an action can be maintained upon a judgment in this state, although the judgment is in full force, and the time within which an execution can be issued has not expired. As counsel have been unable "to find a case where the question was squarely raised, and it was decided that such an action could be maintained at common law until the judgment became dormant, or the execution would prove ineffectual," we refer to the following authorities: "Debt lies upon a judgment within or after the year after the recovery:" Wh. Selw. 444. "By common law, an action could be maintained within a year and a day on a domestic judgment, that being the life of a judgment without issuance of execution:" 1 Com. Dig. 1792, "*Debt*," A 2 (43d ed.), 3, 2, B.

In *Ames* v. *Hoy*, 12 Cal. 11, it was insisted by counsel "that, as an execution could have been issued on the judgment no action could be sustained thereon; or, in other words, that an action of debt will not lie on a judgment if an execution can be issued thereon." Upon this point, the court, BALDWIN, J., delivering the opinion, said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained; and no better

or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment, in order to save or prolong the lien, and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that the defendant may be vexed by repeated judgments on the same cause of action is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

In *Greathouse* v. *Smith*, 4 Ill. (3 Scam.) 541, TREAT, J., delivering the opinion of the court, said: "No rule of law is better settled than the one that an action of debt is maintainable on a judgment of a court of record. The judgment is a good cause of action, it being, as between the parties, the most conclusive evidence of indebtedness. We know of no principle which inhibits the creditor, on a judgment, which is in force and unsatisfied, from recovering in an action brought on it, although he may, at the time of bringing the suit, be entitled to an execution on his judgment. He is at liberty to proceed by execution to collect the judgment or institute a new action on it. Notwithstanding the second suit may be unnecessary, he has the clear legal right to recover, and the courts have no power to prevent him, or impose terms on him for so doing."

In that case, Abraham Lincoln, afterwards president, appeared as one of the counsel.

In *Davidson* v. *Nebaker*, 21 Ind. 334, it was decided that "a judgment is a debt of record, and an action will lie to recover it, whether the judgment is foreign or domestic, notwithstanding the plaintiff may have a remedy on the judgment, in the court where it was rendered, by execution or otherwise."

In *Hale* v. *Angel*, 20 Johns. 342, it was held: "Where an execution, issued on a judgment in justice's court, is not returned at all by the constable, the common-law right of the party remains unimpaired, and he may bring an action of debt on the judgment." In the opinion it was said: "There are no negative words that a party shall not sue on a judgment until the execution has been returned. The common-law right of bringing an action of debt *as soon as a judgment is recovered*, remains unimpaired. The statute does not give the action of debt, but is merely explanatory of the common-law right."

In *Smith* v. *Mumford*, 9 Cow. 26, the case of *Hale* v. *Angel*, *supra*, was referred to and followed.

In *Linton* v. *Hurley*, 114 Mass. 76, it was held: "An action may be maintained upon a judgment, although an execution issued thereupon has not been returned;" and in *O'Neal* v. *Kittredge*, 85 Mass. (3 Allen) 470, it was decided "that a declaration setting forth the recovery by the plaintiff against the defendant, of a judgment for a certain sum as damages, and another certain sum as costs, which judgment remains in full force and unsatisfied, whereby an action hath accrued to the plaintiff to have and recover of the defendant the balance due thereon, and interest, is sufficient on demurrer."

Freeman, in his work on Judgments (3d ed.), sect. 432, says: "At common law a party has a right of action upon his judgment as soon as it is recovered. This right is neither barred nor suspended by the issuing of an execution, nor because, from having the right to take out execution, the plaintiff's action seems to be unnecessary."

Many other cases might be cited supporting the same doctrine, but we think, for present purposes, the above sufficient. If the question were a new one in this state, the writer of this would prefer to follow *Lee* v. *Giles*, 1 Bailey 449, and *Pitzer* v. *Russel*, 4 Or. 124; but the case of *Burns* v. *Simpson* is decisive. That decision was rendered in 1872, and it is for the legislature to interpose and provide that such oppressive and vexatious actions shall not be brought if the rule of the common law, as interpreted in *Burns* v. *Simpson*, *supra*, is to be changed.

Finally, it is urged that the judgment rendered was improper: 1st, because the state had certain rights which the court was bound to consider; and 2d, because the language of the petition did not warrant the judgment. The petition alleged that the only claim the state had upon the property was to secure the payment of $676.80, with interest, and that there was no controversy between the state and Matilda W. Hummer as to the lien of the state. The judgment in no way affected the state, and any person desiring to bid at the sale of the real estate can readily ascertain the state's interest therein. The purchaser at the sale must buy subject to the lien of the state.

In regard to the other matter, it appears that an attachment had been issued, and, after the rendition of the judgment, an order for

the sale of the attached property was properly made: Code, sect. 222. If, however, there was any variance between the prayer of the petition and the judgment rendered, the petition could have been amended, and the judgment will not be reversed on account of such variance: *Railroad Co.* v. *Caldwell*, 8 Kans. 244; *Mitchell* v. *Milhoan*, 11 Id. 630.

The ruling and judgment of the District Court will be affirmed. All the justices concurring.

Debt lies on a judgment generally: 1 Chit. Pl. 121; 1 Tidd's Pr. 3; 3 Black. Com. 129; 1 Selw. N. P. 616; 3 Comyns's Dig. "*Debt*," a. 2; *Bank of Columbia* v. *Newcomb*, 6 Johns. 98; *Taylor* v. *Twiss*, 16 Id. 66; *Andrews* v. *Montgomery*, 19 Id. 162; *Townsend* v. *Carman*, 6 Cowen 695; *Haven* v. *Baldwin*, 5 Iowa 503; *Proctor* v. *Johnson*, 1 Ld. Raym. 670; *Anon.*, Salk. 209, pl. 3; *Millard* v. *Whittaker*, 5 Hill 408; *Jackson* v. *Shaffer*, 11 Johns. 513. So even though part of the judgment may have been collected: 2 Tidd's Pr. 1028; *Hessee* v. *Stevens*, 2 Smith's Rep. 39 S. C. The rule is the same whether the judgment be of a superior or inferior court: *Stuart* v. *Lander*, 16 Cal. 372; 1 Chit. Pl. 111; *Denison* v. *Williams*, 4 Conn. 402; *Cole* v. *Driskill*, 1 Blackf. 16; *Gardner* v. *Henry*, 5 Cold. 458. But in an action upon the judgment of an inferior court, the declaration must show the original cause of action to have been within such court's jurisdiction: 1 Selw. N. P. 616; *Read* v. *Pope*, 1 Cr., M. & R. 302; 1 Chit. Pl. 371; *Sheldon* v. *Hopkins*, 7 Wend. 435; *Spooner* v. *Warner*, 2 Bradw. 240; 4 Tyr. 403. Debt lies whether the judgment be of a domestic or foreign court; a judgment of a foreign court being *prima facie* evidence of indebtedness only; but the merits of a domestic judgment or that of a sister state where the court had jurisdiction of person and subject-matter cannot be gone into in an action founded on the judgment, and *nil debet* is not a good plea: Freeman on Judg., § 435; *Mills* v. *Duryee*, 7 Cranch 481; *Andrews* v. *Montgomery*, 19 Johns. 162; *Hitchcock* v. *Fitch*, 1 Cai. 461; *Taylor* v. *Bryden*, 8 Johns. 173; *Bimeler* v. *Dawson*, 4 Scam. 536; *Hubbell* v. *Coudrey*, 5 Johns. 132; *Nations* v. *Johnson*, 24 How. (U. S.) 203; *Geeen* v. *Orrington*, 16 Johns. 55; *Wright* v. *Mott*, Kirby 152; *Bush* v. *Byvanks*, 2 Root 248; *Biddle* v. *Wilkins*, 1 Peters (U. S.) 686; *Cardesa* v. *Humes*, 5 S. & R. 65; *Hayward* v. *Ribbans*, 4 East 311; *Moore* v. *Bowmaker*, 2 Marsh. 392. In such a case the proper remedy is to have the judgment set aside or reversed by a direct proceeding for that purpose: *Horfy* v. *Daniel*, 2 Levering 161; 1 Chit. Pl. 370. But the record may be disproved to show that the court had not jurisdiction of the person of the defendant: *Knowles* v. *Logansport G. L. & C. Co.*, 19 Wall. 58; *Starbuck* v. *Murray*, 21 Am. Dec. 172. Debt also lies on a judgment recovered in a *qui tam* action in another state: *Heal* v. *Root*, 11 Pick. 389; *Spencer* v. *Brockway*, 1 Ohio 124. So, debt lies upon a *money* decree of a court of chancery of a sister state: *Warren* v. *McCarthy*, 25 Ill. 95; 1 Chit. Pl. 111; *Post* v. *Neafie*, 3 Caines Rep. 22; *McKim* v. *Odom*, 3 Fairf. 94; *Elliott* v. *Ray*, 2 Blackf. 31; *Evans* v. *Tatem*, 9 S. & R. 252; *Tilford* v. *Oakley*, Hemp. 197. But not in Great Britain upon the decree of a domestic court, because such court has the necessary means of enforcing its own orders: 1 Chit. Pl. 111; *Henly* v. *Sopor*, 8 Barn. & Cress. 16, and *Carpenter* v.

Thornton, 3 B. & Ald. 52. And this rule is followed in *Richardson* v. *Jones*, 3 Gill & J. (Md.) 163. But *contra*: *Howard* v. *Howard*, 15 Mass. 196; *Pennington* v. *Gibson*, 16 How. (U. S.) 65; *Nations* v. *Johnston*, 24 Id. 203. And the general rule in this country seems to be that where debt will lie upon a judgment of a court of law, it will lie also upon a chancery decree under like conditions.

In debt on judgment the recovery of a second judgment does not merge the former: *Andrews* v. *Smith*, 9 Wend. 54; *Doty* v. *Russell*, 5 Id. 129; *Jackson* v. *Shaffer*, 11 Johns. 517.

The decision in the principal case, that debt will lie on a judgment within the time in which execution may issue, is supported by the great weight of authority: *Greathouse* v *Smith*, 3 Scam. 54; 6 Wheeler's Com. Law 268; *Hale* v. *Angel*, 20 Johns. 342; *Smith* v. *Mumford*, 9 Cow. 26; *Church* v. *Cole*, 1 Hill 645; *Denison* v. *Williams*, 4 Conn. 102; Com. Dig. "*Debt*" A 2; *Thomson* v. *Lee*, 22 Iowa 206; *Clark* v. *Goodwin*, 14 Mass. 237; *Davidson* v. *Nebaker*, 21 Ind. 334; *Ives* v. *Finch*, 28 Com. 112; *Albin* v. *People*, 46 Ill. 372; *Stewart* v. *Peterson*, 63 Penn. St. 230. The reason for this rule is usually stated to be that interest cannot be collected on a judgment at common law without such second action: *Clark* v. *Goodwin*, 14 Mass. 237; *Hesse* v. *Stevenson*, 2 Smith 39, 42; *Stewart* v. *Peterson*, 63 Penn. St. 230.

The rule is the same whether execution has been returned or not. *Hale* v. *Angel*, 20 Johns. 343; *White River Bank* v. *Downere*, 29 Verm. 332. So with or without averring any special facts as a reason for bringing it: *Denison* v. *Williams*, 4 Conn. 402; *Ives* v. *Finch*, 28 Id. 112.

Notwithstanding the rule appears to be thus settled upon authority, it would seem more in accordance with one's sense of justice that, where nothing is to be gained by the new action other than the coercion that may result from the mere piling up of costs, the common law should be amended by statute and the second action be denied, and this more equitable view, without the aid of legislation, has been adopted in *Pitzer* v. *Russel*, 4 Oreg. 124; *Lee* v. *Giles*, 1 Bail. (S. C.) 449. See, however, *Shooter* v. *McDuffie*, 5 Rich. Law 61, 66, where it was held that the common-law rule related only to fresh suit by common-law process, and not to a suit by foreign attachment.

In *Lee* v. *Giles*, *supra*, ALCOCK, J., says: "I can never sanction the idea that a new action should be permitted by way of punishing a debtor for not paying his debt. There is something barbarous in it, and wholly inconsistent with the mild, benignant and just spirit of the common law. As long as the judgment is operative, the creditor has the means of enforcing payment; and if the debtor can pay, an execution is as effectual as another suit, and more expeditious."

In *Pitzer* v. *Russel*, *supra*, the question was very fully discussed and the conclusion reached "that neither the common law nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment-creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

The question seems generally to depend on whether an action on a judgment could be brought within a year and a day, at common law, that being the time during which execution might issue. Several of the cases cited above take the ground that such action might be so brought, and refer generally to 2 Bac. Abr. *Debt*, A; Comyns's Dig. *Debt*, A 2, and Wheat. Selw. 445 (616, 7th Am. ed.); but these authorities cite 43 Edw. 3, 2 B., which is said, in *Lee* v. *Giles*, 1 Bailey 449, to be an authority that the

action would not lie within the time mentioned; and 2 D'Anv. Abr. 500, *Debt*, C, and 7 Vin. Abr. 352, *Debt*, N, are cited as approving of this view of the case.

In *Stewart* v. *Peterson*, 63 Penn. St. 230, SHARSWOOD, J., renders the decision in 43 Edw. 3, thus: "If one recover upon a statute merchant, the statute gives an execution by *capias*, and also against the land, notwithstanding he can have a writ of debt," and supports the former view of that case. See, also, *Clark* v. *Godwin*, 14 Mass. 237, 239.

In Alabama the courts seem to doubt whether the action would lie within a year and a day, but refuse to follow the principle further, and permit an action to be brought after such time, but within ten years, the time in which execution may issue: *Kingsland* v. *Forrest*, 18 Ala. 519; *Elliott* v. *Holbrook*, 33 Id. 659.

The view taken by SHARSWOOD, J., in *Stewart* v. *Peterson*, of the decision in 43 Edw. 3, seems to be the correct one; and, if such is the case, the weight of modern authority, as above stated, is founded upon a proper view of the common-law rule, and if a change is desirable, it should be made by the legisture, and not by the courts.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Rhode Island.

SINGER MANUFACTURING CO. *v.* KING.

A refusal to deliver an article of personal property to the one entitled to it on demand, is *prima facie* evidence of a conversion.

It is no conversion in a bailee, who has received an article in good faith from a third person, to refuse to deliver it to the owner making the demand until he has had an opportunity to satisfy himself in regard to the ownership.

A servant receiving a chattel from his master ought not to give it up without consulting his master with regard to it; but, if after such consultation he relies on his master's title, and refuses to comply with the owner's demand, he is guilty of a conversion.

The defendant, by order of his principal, the American Sewing Machine Co., received through a fellow-servant, held a machine of the plaintiff on a claim of storage, which was ill-founded but in good faith, and refused to deliver it up. He had no personal interest in the matter. *Held*, that the defendant was liable.

EXCEPTIONS to the Court of Common Pleas.

Ziba O. Slocum, for the plaintiff.

Albert D. Bean, for the defendant.

The opinion of the court was delivered by

DURFEE, C. J.—This is trover for the conversion of a sewing machine belonging to the plaintiff company. The case was tried in the Court of Common Pleas and comes here on exceptions. The

testimony given at the trial for the plaintiff went to show that the machine was demanded of the defendant by direction of Charles H. Harris, agent for plaintiff, and that the defendant, who was agent for the American Sewing Machine Company, though he had the machine, refused to deliver it until storage was paid for it or until another machine belonging to the American Sewing Machine Company which the plaintiff had was returned. The defendant testified that the machine was brought to him by one Conner, an employee of the American Sewing Machine Company, that he was instructed to hold it for storage, and that, though he did not announce it when the demand was made, the plaintiff knew that he was agent for the American Sewing Machine Company. It further appeared that the machine had been leased to a Mrs. Lynch by the plaintiff company, that Conner had received it from her, leaving a machine of the American Company in place of it, that he had carried it to Harris, and that Harris refused to receive it, saying that his company had no machines out which were then due, that he then carried it to the American Sewing Machine Company and told Harris that he had done it. Harris testified in reply that he did not see the machine when Conner brought it and that he had not authorized any one to store it with the American Company.

The court instructed the jury that if the defendant, when demand was made to him, was the agent of the American Sewing Machine Company and was holding the machine under their orders and not for himself or under his own control, then the defendant would not be guilty. The plaintiff excepted.

The plaintiff asked the court to instruct the jury that the defendant would be guilty unless he told the plaintiff when the demand was made that he was holding the machine as servant of the American Sewing Machine Company. The court refused so to instruct the jury, but did instruct them that the defendant's omission to give the information would not constitute a conversion, but would be evidence for them to consider in determining the question as to whether he was holding the machine as agent or not. The plaintiff excepted. The question is, were the instructions and the refusal to instruct correct.

Ordinarily when one person has the chattel of another it is his duty to deliver it to the owner or his agent on demand, and if he refuses to do so his refusal is evidence of a conversion. It is, however, only *prima facie* evidence and may be

explained: *Magee* v. *Scott*, 9 Cush. 148; *Robinson* v. *Burleigh*, 5 N. H. 225; *Dietus* v. *Fuss*, 8 Md. 148; *Green* v. *Dunn*, 3 Camp. N. P. 215; *Solomons* v. *Dawes*, 1 Esp. 83. Thus it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership: *Carroll* v. *Mix*, 51 Barb. 212; *Lee* v. *Bayers*, 18 C. B. 599, 607; *Sheridan* v. *New Quay Co.*, 4 C. B. (N. S.) 618; *Coles* v. *Wright*, 4 Taunt. 198. In the case of a servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting his master in regard to it: *Mires* v. *Solebay*, 2 Mod. 242, 245; *Alexander* v. *Southey*, 5 B. & A. 247; *Berry* v. *Vantries*, 12 S. & R. 89. But after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion: *Lee* v. *Robinson*, 25 L. J., C. P. 249; s. c. 18 C. B. 599; 1 Addison on Torts, sect. 475; *Greenway* v. *Fisher*, 1 Car. & P. 190; *Stephens* v. *Elwall*, 4 M. & S. 259; *Perkins* v. *Smith*, 1 Wils. 328; *Gage* v. *Whittier*, 17 N. H. 312. The mere fact that he refuses, for the benefit of his principal, will not protect him; *Kimball* v. *Billings*, 55 Me. 147.

In the case at bar the defendant, acting as agent of the American Sewing Machine Company, refused to deliver the machine in obedience to instructions not to deliver it until storage was paid for it. The defendant did not refuse for the purpose of consulting his principal, but it would seem he had received his instructions before the demand in anticipation of it. He was not a mere servant but an agent, and he may have been, for anything that appears, a general agent. The machine came to him, not from his master or principal, as in *Mires* v. *Solebay*, but from a fellow-employee, and he may have known—indeed the evidence carries the impression that he did know—all the circumstances in regard to it, and nevertheless co-operated with his principal in withholding it from its owner by insisting on a condition which neither he nor his principal had any right to impose. If such was the fact we think he was guilty; and yet, if such was the fact, the jury might have found him not guilty under the instructions given by the court which are the ground of the first exception. The first exception must therefore be sustained. We do not find any error in the

instructions which are the ground of the second exception, except in so far as they involve a repetition of instructions before given. The case will be remitted for a new trial.

Exceptions sustained.

Mr. Justice COOLEY has defined conversion as follows: "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion:" Cooley on Torts 428. Mr. Abbott, in his Law Dictionary, defines it to be "a wrong; consisting in dealing with the property of another as if it were one's own, without right." A third definition, given by an accurate writer, is this: "It may be laid down, as a general principle, that the assertion of a title to, or an act of dominion over, personal property, inconsistent with the right of the owner, is a conversion:" Note of Mr. Bigelow to *Donald* v. *Suckling;* Bigelow's Leading Cases on Torts 394. By a recent authority it has been said: "At common law, a conversion is that tort which is committed by a person who deals with chattels not belonging to him, in a manner which is inconsistent with the rights of the lawful owners:" Rapalje & Lawrence's Law Dict. See Bouvier's Law Dict.; 6 South L. Rev. 822.

Turning from the writers of authority, we find, among many, the following definitions of the courts: "Conversion consists in the exercise of dominion and control over property inconsistent with and in defiance of the rights of the true owner or party having the right of possession:" *Badger* v. *Hatch*, 71 Me. 565.

"Conversion means the wrongful turning to one's use the personal goods of another, or doing some wrongful act inconsistent with or in opposition to the right of the owner." *Nichols* v. *Newsom*, 2 Murphy (N. C.) 303.

"It is not necessary to a conversion that there should be a manual taking of the thing in question, by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use." *Bristol* v. *Burt*, 7 Johns. 254.

"Any actual wrongful exercise or assumption by a person himself, or by another, by his procurement, over the goods of the real owner, by which he is deprived of them, is a conversion:" *Hale* v. *Ames*, 2 T. B. Mon. 143; s. c. 15 Am. Dec. 150. See generally, for definitions, *Bowlin* v. *Nye*, 10 Cush. 416; *Clark* v. *Whitaker*, 19 Conn. 319; *Murray* v. *Burling*, 10 Johns. 172; *Reynolds* v. *Shuler*, 5 Cow. 323; *Connah* v. *Hale*, 23 Wend. 462; *Spencer* v. *Blackman*, 9 Wend. 167; *Ferguson* v. *Clifford*, 37 N. H. 101; *Laverty* v. *Snethen*, 68 N. Y. 524; *Syeds* v. *Hay*, 4 T. R. 264; *Bell* v. *Layman*, 1 T. B. Mon. 39; s. c. 15 Am. Dec. 83; *Burroughes* v. *Bayne*, 5 Hurl. & Norm. 300; *Keyworth* v. *Hill*, 3 B. & Ald. 687; *Fouldes* v. *Willoughby*, 8 M. & W. 540; *Roach* v. *Turk*, 9 Heisk. 708; *Polley* v. *Lenox Iron Works*, 2 Allen 182.

Bearing in mind these definitions, that a conversion conveys with it the exclusion of the one entitled to it, of the possession of the article in question, we arrive at the effect of a demand upon and refusal by the one in possession, when such demand is made by the one lawfully, at the time of making it, entitled to the possession; the refusal denotes the exercise of an act of ownership over the chattel to the exclusion of the right of the rightful owner; it is an act in defiance of the owner's right. It is an act of ownership inconsistent with the dominion of the owner; his right of possession is denied.

It therefore follows that a demand for the chattel upon the party in possession, and a refusal to deliver it, taken together, are evidence of a conversion, because the one in possession, no matter in what way he obtained the possession, cannot lawfully detain such chattel after the owner has demanded it; and if he still detains it, it is evidence that he claims it as his own and so uses it: *Magee* v. *Scott*, 9 Cush. 148; *Folsom* v. *Manchester*, 11 Id. 334; *Sturges* v. *Keith*, 57 Ill. 451; *Coffin* v. *Anderson*, 4 Blackf. 395; *Way* v. *Davidson*, 12 Gray 465; *Munger* v. *Hess*, 28 Barb. 75; *Huxley* v. *Hartzell*, 44 Mo. 370; *Thompson* v. *Rose*, 16 Conn. 71.

Such evidence, however, is only *prima facie* evidence of a conversion—of a conversion prior to the making of the demand. If the plaintiff can prove an actual conversion without the demand, none need be made; and if the defendant is entitled to be called upon for a delivery up of the chattel, on refusal it will be presumed that he had, prior to such demand actually converted the chattel to his own use, to the exclusion of the rightful owner; "such demand and refusal are evidence of a conversion, *prima facie* sufficient to support this action:" *Way* v. *Davidson*, 12 Gray 465; *Sturges* v. *Keith*, 57 Ill. 451; *Folsom* v. *Manchester*, 11 Cush. 334; *Magee* v. *Scott*, 9 Id. 148; *Hagar* v. *Randall*, 62 Me. 439; *Zimmerman* v. *Fairbank*, 35 Wis. 368; *Pease* v. *Smith*, 61 N. Y. 477; *Gillet* v. *Roberts*, 57 Id. 28; *Battel* v. *Crawford*, 59 Mo. 215; *Robinson* v. *Hartridge*, 13 Fla. 501; *Salt Springs Nat. Bank* v. *Wheeler*, 48 N. Y. 492; *Ray* v. *Light*, 34 Ark. 421; *Ingersoll* v. *Barnes*, 47 Mich. 104: *Lockwood* v. *Bull*, 1 Cow. 322; s. c. 15 Am. Dec. 539; *Thompson* v. *Trail*, 6 B. & C. 39; *Lathrop* v. *Blake*, 23 N. H. 46; *Garvin* v. *Luttrell*, 10 Humph. 16; *Boothe* v. *Estes*, 16 Ark. 104; *Case* v. *N. Y. & New Haven Railroad Co.*, 1 E. D. Smith 522; *McCombie* v. *Davies*, 6 East 538; *Dietus* v. *Fuss*, 8 Md. 148; *Agar* v. *Lisle*, 1 Hob. 187; *Oxford's Case*, 10 Coke 57.

The reason why the demand and refusal does not of itself constitute a conversion is, that the defendant may have the right to detain the chattel, or it may not be in his possession and so beyond his power to return it. In such instances, if it appear from the plaintiff's evidence that the defendant has a right to retain the property, the latter may well rest the case without further evidence; but if it does not so appear, he must affirmatively show his right to retain it: *Isaac* v. *Clark*, 2 Bulst. 306; *Watt* v. *Potter*, 2 Mason 77; *Kennet* v. *Robinson*, 2 J. J. Marsh. 84; *Robinson* v. *Skipworth*, 23 Ind. 311.

His refusal may also be based upon the fact that he, at the time, has no control over the property, and that it is not in his possession. While evidence of a positive refusal, unexplained, is *prima facie* proof that the one making such refusal has the possession of the chattel demanded, it is not conclusive; and hence it follows, on this ground also, that proof of a demand and refusal is only evidence of a conversion, not a conversion itself, and such presumption may be rebutted: *Hunt* v. *Kane*, 40 Barb. 638; *Kelsey* v. *Griswold*, 6 Id. 436; *Kimball* v. *Post*, 44 Wis. 471; *Fillmore* v. *Horton*, 31 How. Pr. 424; *Irish* v. *Cloyes*, 8 Vt. 33; *Buck* v. *Ashley*, 37 Id. 475; *Morris* v. *Thomson*, 1 Rich. (S. C.) 65; *Davis* v. *Buffum*, 51 Me. 160; *Robinson* v. *Hartridge*, 13 Fla. 501.

Likewise his refusal may be based upon the ground that the person making the demand, is not, at the time, entitled to the possession of the chattel in question. If such is the case, the defendant is not bound to deliver up the article: *Wilson* v. *Wilson*, 37 Md. 1; *Dudley* v. *Abner*, 52 Ala. 572; *Ogle* v. *Atkinson*, 5 Taunt. 759; *King* v. *Richards*, 6 Whart. 418; *Carter* v. *Kingman*, 103 Mass. 517.

What a demand and refusal, unexplained, amounts to is very well illustrated by a special verdict. The question of a conversion is always one for the jury, to be drawn from the evidence: *Lockwood* v. *Bull*, 1 Cow. 322; *O'Donoghue* v. *Corby*, 22 Mo. 396; *Huxley* v. *Hartzell*, 44 Id. 370; *Watt* v. *Potter*, 2 Mason 78; *Dent* v. *Chiles*, 5 Stew. & Por. 383; s. c. 26 Am. Dec. 350. If the jury gives a special verdict, finding merely a demand and refusal, it is not sufficient to justify the entry of a judgment, even though the plaintiff has proven that he is the owner and entitled to the possession, which facts are also found by the jury: *Gordon* v. *Stockdale*, 89 Ind. 240, 245; *Oxford's Case*, 10 Coke 57; *Hill* v. *Covell*, 1 N. Y. 522; s. c. 4 Denio 323; *Eason* v. *Newman*, Cro. Eliz. 495; *Isaac* v. *Clark*, 2 Bulst. 306; s. c. Moore 841; 1 Roll. 126; *Mires* v. *Solebay*, 2 Mod. 242. See Gould on Pleading, sect. 166.

And the same rule applicable to a jury is also applicable to a referee; he must find an actual conversion and not a mere demand and refusal for the act of conversion. He must draw the inference of conversion—the conclusion: *Munger* v. *Hess*, 28 Barb. 75.

That a demand and refusal does not constitute a conversion is easily perceived in another direction; as in the case of a demand and refusal made after suit brought. In such an instance they may go to the jury as evidence of a conversion prior to the bringing of the suit: *Morris* v. *Pugh*, 3 Burr. 1241; *Jessop* v. *Miller*, 2 Abb. App. Dec. 449; see *Storm* v *Livingston*, 6 Johns. 44.

The refusal may be so qualified as to rebut the presumption of a conversion, and in such a case further proof in support of the allegation of conversion must be adduced: *Gillet* v. *Roberts*, 57 N. Y. 28.

The refusal must amount to a denial of the demandant's right: *Hagar* v. *Randall*, 62 Me. 439; *Spooner* v. *Holmes*, 12 Mass. 503: *Morris* v. *Thomson*, 1 Rich. (S. C.) 65; *Watt* v. *Potter*, 2 Mason 77; *McIntosh* v. *Summers*, 1 Cranch C. C. 41; *Robinson* v. *Burleigh*, 5 N. H. 225; *Thomson* v. *Sixpenny*, 5 Bosw. 293; *Zachary* v. *Pace*, 9 Ark. 212; *Barnes* v. *Taylor*, 29 Me. 514; *Severin* v. *Keppell*, 4 Esp. 156; *Dent* v. *Chiles*, 5 Stew. & Port. 383; 26 Am. Dec. 350.

If the chattel has come into or is in the possession of the defendant lawfully and the owner demand the possession, and the former assign an unlawful excuse for retaining it, he thereby waives any valid excuse he may have for retaining it, and the refusal it is said, in some cases, is not only the evidence of a conversion, but the conversion itself. "It is true, a demand and refusal is not a conversion, but only evidence of one; and the reason is, the party may have a lawful reason for what he did. Here, however, he states the reason; and it is altogether insufficient; this refusal is without lawful excuse, and therefore without anything more, a conversion of the property to his own use:" *O'Donohue* v. *Corby*, 22 Mo. 396; *Huxley* v. *Hartzell*, 44 Id. 370; *Alvord* v. *Davenport*, 43 Vt. 30; *Baldwin* v. *Cole*, 6 Mod. 212.

But the doctrine of these cases, and some others, is entirely untenable, the evidence can never be substituted for the fact necessary to be proven. Such a rule "confounds cause and consequence, the evidence of a fact with the fact itself. It assumes that the person demanding the property is always duly authorized to make such demand, and that the person in possession is always bound to know the rightful owner:" *Dent* v. *Chiles*, 5 Stew. & Port. 383; s. c. 26 Am. Dec. 350. "But, if the refusal do not turn upon the supposed want of authority, if the party waives an inquiry into the authority, or admits its sufficiency, and puts his refusal upon another and distinct ground, which cannot in point of law, be sup-

ported, there the refusal, under such circumstances, is presumptive evidence of conversion :" *Watt* v. *Potter*, 2 Mason 78; 2 Greenl. Ev. secs. 644, 645. *Contra*, 6 Southern L. Rev. 834.

It is, however, well settled by the uthorities that a refusal based upon reasons asigned at the time, is a waiver of all other excuses, even though valid; and the one making such refusal cannot afterwards insist upon any valid right of retention he may have had at the time of the demand and refusal. He is bound to the statement he makes at the time, and can never urge another, unless, possibly, a new right to him should afterwards accrue before suit brought. This point clearly appears in the principal case: *Spence* v. *Mitchell*, 9 Ala. 744; *Ingalls* v. *Bulkley*, 15 Ill. 224; *O'Donoghue* v. *Corby*, 22 Mo. 394; *Judah* v. *Kemp*, 2 Johns. Cas. 411; *Robertson* v. *Crane*, 27 Miss. 362; *Watt* v. *Potter*, 2 Mason 77; *Barnes* v. *Taylor*, 29 Me. 524.

In the case of a bailee, if he absolutely refuses to deliver the chattels to the owner on demand, or denies his right to them, or assumes to be himself the owner, or interposes an unreasonable objection to delivering them, or exhibits bad faith in regard to the transaction, a conversion of the property may be inferred. Thus where the defendant had received chattels from A. without knowing who was the owner, but having every reason to suppose A. to be the owner, and on demand being made by B. claiming to be the owner, did not set up any claim to them, nor dispute the claimnant's right, but stated, in substance, that he did not know the claimant was the owner; that the property was left by A., and that he desired the order of his father, or A., before delivering the same, or an opportunity to confer with his father in regard thereto; it was held that this was not such a refusal as amounted to a conversion of the chattels: *Carroll* v. *Mix*, 51 Barb. 212; see *Tuttle* v. *Gladding*, 2 E. D. Smith 157; *Holbrook* v. *Wight*, 24 Wend. 169; *Monnot* v. *Ibert*, 33 Barb. 24; *Fletcher* v. *Fletcher*, 7 N. H. 452; s. c. 28 Am. Dec. 359; *Lee* v. *Robinson*, 25 L. J. C. P. 249; *Lee* v. *Bayes*, 18 C. B. 607; *European & Austr. R. M. Co.* v. *R. M. St. P. Co.*, 30 L. J. C. P. 247; *Sheridan* v. *New Quay Co.*, 4 C. B. (N. S.) 618. Of course refusal to deliver the property to one whom the bailee knows to be the owner is a conversion; especially so if the bailor had obtained it wrongfully: *Doty* v. *Hawkins*, 6 N. H. 247; s. c. 25 Am. Dec. 459; *Nickerson* v. *Darrow*, 5 Allen 419; *Stanley* v. *Gaylord*, 1 Cush. 536.

But a bailee who asks time to surrender the property to the bailor is not guilty of a conversion: *Dowd* v. *Wadsworth*, 2 Dev. (N. C.) L. 130; *Pillot* v. *Wilkinson*, 32 L. J. Exch. 201; *Woodley* v. *Coventry*, 2 H. & C. 164; *Buxton* v. *Baughan*, 6 C. & P. 674.

So if a thing is bailed, and a third person, with the permission of the bailor, who is entitled to reclaim the thing, demands it of the bailee, but gives no evidence of his right to do so, the refusal of the bailee to deliver up the thing upon such demand, will not amount to a conversion: *Beckley* v. *Howard*, 2 Brev. (S. C.) 94; *Ingalls* v. *Bulkley*, 15 Ill. 224.

So a refusal after demand is no conversion, if the circumstances show that it is caused by a reasonable apprehension of the consequences, in a doubtful matter; and a refusal from a misapprehension of the law may be reasonable, and so prevent its having the effect of a conversion: *Fleteher* v. *Fletcher*, 7 N. H. 452; s. c. 28 Am. Dec. 359; *Jacoby* v. *Laussatt*, 6 S. & R. 300; *Watt* v. *Potter*, 2 Mason 77; *Holbrook* v. *Wight*, 24 Wend. 169; *St. John* v. *O'Connel*, 7 Port. 466; *Zachary* v. *Pace*, 4 Eng. (Ark.) 212; *Ingalls* v. *Bulkley*, 13 Ill. 315.

In the case of a servant, it has been said that he does not do his duty if he gives

up the goods his master has entrusted him with, on the demand of a stranger, without a previous application to his master for instructions. Therefore, a refusal by the servant to deliver up the goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable and justifiable refusal, and no evidence of a conversion: *Alexander* v. *Southey*, 5 B. & Ald. 249; *Mires* v. *Solebay*, 2 Mod. 245. The law gives the servant the privilege of saying that he received the goods from his master, and that the latter ought to have an opportunity of admitting or rejecting the claimant's title, and of giving instructions in the matter. Therefore, such a qualified refusal is not a conversion: *Lee* v. *Bayes or Robinson*, 18 C. B. 599; s. c. 2 Jur. (N. S.) 1093; 25 L. J. C. P. 249. After receiving his instructions of his master, or after having had an opportunity to receive them, if he sets up or relies upon the master's title, and gives an absolute and unqualified refusal to deliver up the goods, he is then guilty of a conversion of the goods, if the person demanding them is entitled to their immediate possession: *Lee* v. *Bayes or Robinson*, *supra*. It is a conversion for the benefit of his master, for which the servant is liable: *Cranch* v. *White*, 1 Scott 314; s. c. 1 Bing. N. C. 414; 1 Hodges 61; *Stephens* v. *Elwall*, 4 M. & S. 259. See *Perkins* v. *Smith*, 1 Wils. 328, and *Coffin* v. *Anderson*, 4 Blackf. 395. See the instructive case of *Dent* v. *Chiles*, 5 Stew. & Port. 383; s. c. 26 Am. Dec. 350; 6 Southern Law Review 837.

If the person retaining the chattel is not a mere executive agent, but has discretionary power, and is a *locum tenens* of the principal, as in the principal case, invested with all the authority of his employer, like the superintendent of a factory, he is liable for a refusal; *Berry* v. *Vantries*, 12 S. & R. 89.

Nor can a servant, acquainted with all the facts, shield himself, if he dispose of the property in accordance with his master's orders: *Gage* v. *Whittier*, 17 N. H. 312; *Kimball* v. *Billings*, 55 Me. 147.

Of course the servant cannot maintain trover for his master's property: *Tuthill* v. *Wheeler*, 6 Barb. 362; *Lehigh Co.* v. *Field*, 8 W. & S. 232.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of the United States.

CONNECTICUT MUTUAL LIFE INS. CO. *v.* UNION TRUST CO.

A provision in a state statute that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that state, in trials at common law.

Section 721 of the Revised Statutes, declaring that "the laws of the several states except where the constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," relates to the nature and principles of evidence, and also to competency of witnesses, except

as the latter subject may be regulated by specific provisions of the statutes of the United States.

To the question, in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was No: *Held*, that the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease, that is of a character so well defined and marked as to materially disturb or derange for a time its vital functions; that the question did not require him to state every instance of slight or accidental disorders or ailments, affecting the liver, which left no trace of injury to health, and were unattended by substantial injury, or inconvenience, or prolonged suffering.

An exception to the modification by the court, in its general charge, of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too vague and indefinite.

ERROR to the Circuit Court for the Southern District of New York.

The opinion of the court was delivered by

HARLAN, J.—This is an action upon a policy of life insurance in which a verdict and a judgment were rendered for the plaintiff. The policy was taken out on the 21st of February 1878, by the Union Trust Company of New York for the benefit of the children of William Orton who might survive him. The insured died on the 22d of April of the same year. In the application, signed by the trust company and by Orton, the following question (the seventh) was propounded: "Have you ever had any of the following diseases? Answer (yes or no) opposite each." Then follows a list of the diseases about which the applicant was asked—apoplexy, paralysis, insanity, epilepsy, habitual headache, fits, consumption, pneumonia, pleurisy, diphtheria, bronchitis, spitting of blood, habitual cough, asthma, scarlet fever, dyspepsia, colic, rupture, fistula, piles, affection of liver, affection of spleen, fever and ague, disease of the heart, palpitation, aneurism, disease of the urinary organs, syphilis, rheumatism, gout, neuralgia, dropsy, scrofula, small-pox, yellow fever, and cancer or any tumor. As to colic, fistula, and fever and ague, the answer was Yes, and as to all the other diseases, No. Being asked, in the same question, to state the number of attacks, character and duration, of all the diseases which he had had, the applicant answered: "Had fistula in 1871, induced by intermittent fever; radically cured."

The eighth question was: "Have you had any other illness, local disease, or personal injury; and if so, of what nature, how

long since, and what effect on general health ?" The answer was: "Had colic for one day, October 1877; no recurrence; general health good."

The fourteenth was: "How long since you were attended by a physician; in what disease? Give name and residence of such physician." The answer was: "October 1877; for colic; Dr. Hasbrouck, of Dobb's Ferry; sick one day."

The fifteenth was: "Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer was: "No; nothing to my knowledge."

The sixteenth was: "Have you reviewed the answers to the above questions, and are you sure they are correct?" The answer was, Yes.

The application concluded in these words:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; * * and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company."

Upon the back of the application were several endorsements, among them the following:

"PROOFS OF DEATH REQUIRED.—Blanks for the several certificates required to be made in proof of death will be furnished upon request."

The policy purports to have been issued in consideration of the representations and declarations made in the application, and of the payment of the annual premium at the time designated therein. It purports, also, to have been issued and accepted upon certain express conditions and agreements, among which are: "That the answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the assured to be true in all respects, and that, if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void."

This action was brought to recover the amount insured—due notice and satisfactory evidence of death having been given. The company resisted recovery upon two grounds:

1. That the answers to the seventh, eighth, fourteenth, and sixteenth questions were false and untrue, and known to be by Orton, in this: that so far from his general health being good at the time of the making and delivery of the application and of the issuing of the policy, he had, for many years immediately prior thereto, suffered with piles, affection of the liver, and habitual headache, and within less than eighteen months prior to the application had been seriously ill for weeks, during which period several physicians attended him; that the illness in October 1877, continued for some days; that he visited Europe upon one or more occasions for the benefit of his health, and by reason of disease was much enfeebled in body; and that at the time of issuing the policy defendant did not know or have reason to believe that said statements, answers, and declarations, or any of them, were untrue, but, believing them to be true, issued the policy; and that by reason of these facts it was null and void.

2. That in the application it was declared that the statements therein were correct and true, and that there was not, to the knowledge of the insured, any fact relating to his physical condition, personal or family history, or habits, not stated in answer to the questions in the application, with which the officers of the defendant ought to be made acquainted; yet, he had been and was subject to and afflicted with the diseases therein specified; had a very serious illness and been attended by several physicians; was ill in October 1877, much longer than stated; and had visited Europe for his health; which facts were within his knowledge, and were material circumstances in relation to the past and present state of his health, habits of life, and condition, rendering an insurance on his life more than usually hazardous and with which the officers of the company should have been made acquainted; that these facts were concealed from, and misrepresented to, the company by Orton, whereby it was injuriously influenced, and induced to omit such examinations and precautions in reference to his condition and health as would have prevented the issuing the policy upon the considerations and conditions therein set forth; and that, by reason of such concealment and misrepresentation, the policy was and is absolutely null and void.

In support of the defence, physicians, who had attended the insured professionally, were examined as witnesses; and the first assignment of error relates to the refusal of the court to permit them to answer questions, the object of which was to elicit information which would not have been allowed to go to the jury, under section 834 of the Code of Civil Procedure of New York, had the action been tried in one of the courts of the state. That section provides that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." It is not, and could not well be, seriously questioned, that the evidence excluded by the Circuit Court was inadmissible under the rule prescribed by that section. *Grattan* v. *Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Same* v. *Same*, 80 Id. 281; *Pearson* v. *People*, 79 Id. 424; *Edington* v. *Ætna Life Ins. Co.*, 77 Id. 564; *Edington* v. *Mutual Ins. Co.*, 67 Id. 185.

But it is suggested that truth and justice require the admission of evidence which this statutory rule, rigorously enforced, would exclude, and that it can be admitted without disturbing the relations of confidence properly existing between physician and patient; that it would not afflict the living nor reflect upon the dead, if the physician should testify that his patient had died from a fever, or an affection of the liver; and that the rule, as now understood and applied in the courts of New York, shuts out, in actions upon life policies, the most satisfactory evidence of the existence of disease, and of the cause of death. These considerations, not without weight, so far as the policy of such legislation is concerned, are proper to be addressed to the legislature of that state. But they cannot control the interpretation of the statute, where its words are so plain and unambiguous as to exclude the consideration of extrinsic circumstances. Since it is for that state to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the Circuit Court of the United States is required, by the statutes governing its proceedings, to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative. By section 721 of the Revised Statutes, which is a reproduction of the 34th section of the Judiciary Act of 1789, it is declared that "the laws of the several states, except where the constitution, treaties, or statutes of the

United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." This has been uniformly construed as requiring the courts of the Union, in the trial of all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the states in which such courts are held. *Potter* v. *National Bank*, 102 U. S. 165; *Vance* v. *Campbell*, 1 Black 427; *Wright* v. *Bales*, 2 Id. 535; *McNeil* v. *Holbrook*, 12 Pet. 84; *Sims* v. *Hundley*, 6 How. 1.

There is no ground for the suggestion that sections 721, 858, and 914 of the Revised Statutes may be construed as relating to the competency of witnesses rather than to the nature and principles of evidence. While in some of the cases the question was whether a witness, competent under the laws of a state, was not, for that reason, under the 34th section of the act of 1789, a competent witness in the courts of the United States sitting within the same state, in others the question had reference to the intrinsic nature of the evidence introduced. In *McNeil* v. *Holbrook* the court held the courts of the United States, sitting in Georgia, to be bound by a statute of that state declaring, as a rule of evidence, that in all cases brought by an endorser or assignor on any bill, bond, or note, the assignment or endorsement, without regard to its form, should be sufficient evidence of the transfer thereof; the bond, bill, or note to be admitted as evidence without the necessity of proving the handwriting of the assignor or endorser. And in *Sims* v. *Hundley*, a notary's certificate, held to be inadmissible as evidence under the principles of general law, was admitted upon the ground that, having been made competent by a statute of Mississippi, it was competent evidence in the Circuit Court of the United States sitting in that state.

We perceive nothing in the other sections of the Revised Statutes to which attention is called that modifies section 721, except that, by section 858, the courts of the United States, whatever may be the local law, must be guided by the rule that "no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried;" and by the further rule, that, "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the

other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." "In all other respects," the section proceeds, "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." As to section 914, it is sufficient to say that it does not modify section 721 in so far as the latter makes it the duty of the courts of the United States, in trials at common law, to enforce—except where the laws of the United States otherwise provide—the rules of evidence prescribed by the laws of the states in which they sit.

For these reasons, it is clear that the Circuit Court properly refused to permit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity.

The widow of the insured having been called as a witness on behalf of the company, it is contended that the court erred in not allowing her to answer this question: "Did you not understand from your husband the nature of the disease?" That question, it is claimed, called for information derived from the insured as to the nature of any disease under which he may have been suffering at a particular time prior to his application. If she was a competent witness, and if the statements of the insured to her were admissible upon the issue whether he had concealed any fact in his personal history or condition with which the company ought to have been made acquainted, or upon the issue whether he had made fair and true answers to the questions put to him, still the question did not call for his statements, but only as to what the witness understood from him as to the nature of his disease. Her statements of what she understood may not have been justified by what the insured actually said, and may have been nothing more than the unwarranted deduction of her own mind. The objection to the question was properly sustained.

This brings us to the consideration of questions more directly involving the merits of the case. The first of these relates to the refusal of the court to instruct the jury that if they "believe, on the evidence, that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance,

the policy is void, and the defendant is entitled to a verdict." This instruction was refused, and the court, among other things, said to the jury, that disease implied a substantial attack of illness, or a malady, which had some bearing on the general health of the insured, not a slight illness, or temporary derangement of the functions of some organ.

The defendant's request for instruction was properly denied, for the reason that it might have been construed as requiring a verdict for the company, upon its appearing simply that the insured, prior to his application, had experienced a slight, temporary affection of the liver, which had no tendency to shorten life, and all the symptoms of which had disappeared, leaving no trace whatever of injury to health. The insured was directed to answer Yes or No, as to whether he had ever had certain diseases, among which was included "affection of liver." It is difficult to define precisely what was meant by "affection of liver," as a disease, and the difficulty is not removed by the evidence of the only physician who testified upon the subject. While he would ordinarily understand affection of the liver to mean some chronic disease of that organ, yet it is not, he says, strictly a medical term, but a general expression, which, by itself, may include acute as well as chronic disease of the liver. He describes it as "a big bag to put many diseases in," and observes that it "would cover anything in the world the matter with the liver." It seems to the court, however, that the company, by its question, sought to know whether the liver had been so affected that its ordinary operations were seriously disturbed or its vital power materially weakened. It was not contemplated that the insured could recall, with such distinctness as to be able to answer categorically, every instance during his past life, or even during his manhood, of accidental disorder or ailment affecting the liver, which lasted only for a brief period, and was unattended by substantial injury, or inconvenience, or prolonged suffering. Unless he had an affection of the liver that amounted to disease, that is, of a character so well defined and marked as to materially derange for a time the functions of that organ, the answer that he had never had the disease called affection of the liver was a "fair and true" one; for, such an answer involved neither fraud, misrepresentation, evasion, nor concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted. The charge, upon this point, was in accordance

with these views, and no error was committed to the prejudice of the company.

There was evidence before the jury tending to show that the insured visited Europe in 1874, under the advice of Dr. Baner, a physician, and that he was ill in 1875 as well as in the month of October 1876. At the trial the defendant read in evidence, without objection, the proofs of loss received by it from the Trust company. The proofs were made on forms supplied by the insurance company. Among them was a certificate from Dr. Baner, who attended the insured in his last illness. That certificate was made up of questions to and answers by the physician. One of the questions required him to state the remote cause of death; if from disease, to give the predisposing cause, the first appearance of its symptoms, its history, and the symptoms present during its progress. His answer was: "The fatal attack was preceded by severe and protracted mental work, and by several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement." He also stated, in the certificate, that the immediate cause of death was cerebral apoplexy; that he did not think the insured had any other disease, acute or chronic, or had ever had any injury or infirmity; and that there was nothing in his habits, or mode of life, predisposing him to disease, except a tendency to overwork.

Several instructions were submitted by the company touching this part of the case. In the form asked they were refused. But such refusal would not constitute ground for reversing the judgment, if the propositions they involved, so far as correct, were embraced by the charge. The jury were instructed, upon the whole case, that the insured warranted the truth, in all respects, of each answer, statement, representation and declaration contained in the application, which was a part of the policy; that any inquiry as to their materiality, or his good faith, was removed, by the agreement of the parties, from the consideration of the court or jury; that the truth of each answer was an express condition to the existence of liability on the part of the company; and that if the answers, or any of them, were, in fact, untrue, the contract was at an end, although the insured, in good faith, believed them to be true. Their attention was particularly called to the answer to the eighth question in the application, in which the insured—responding to the inquiry, whether he had had any other illness, local disease, or personal injury—stated nothing more than that "he had colic for

one day, October 1877; no recurrence; general health good." The court said: "Illness is a word which may include, properly, an attack of a less grave and serious character than a disease; an illness may be slight or severe; in either case it is an illness." Referring also to a question which required the insured to state any fact relating to his physical condition, personal or family history, or habits, not already disclosed, and with which the company ought to be made acquainted, the court—almost in the language of defendant's eighth request—charged the jury, that if they believed, on the evidence, "that the trip to Europe advised by Dr. Baner, the illness in 1875, or the illness in 1876, or the suffering of several attacks of malarial fever, accompanied by cerebral engorgement, (if those attacks occurred, or either of them,) were facts relating to the physical condition and personal history of the insured, of importance to the ascertainment of the condition of his health at the time of his application, the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to recover." After reviewing all the evidence, the court concluded its charge by instructing the jury that if they found affirmatively that the insured "did not answer one of these questions truly, then there is nothing more for you to do except to find for the defendant; if you find affirmatively that he was guilty of concealment in his answer to the fifteenth question, then you will find for the defendant."

We are of opinion that the charge—the most important parts of which we have quoted—was not one of which the company had any reason to complain; and the plaintiff, having recovered a verdict, makes no objection to it.

In reference to that portion of the charge referring to the statements in the certificate of Dr. Baner, made part of the proofs of loss, the point is made that the court erroneously instructed the jury, that they could not, upon that certificate—made without cross-examination and simply to inform the company of the death of the insured—find as an affirmative fact, that the malarial attacks therein referred to as the remote cause of death, existed.

Without determining whether this certificate, so far as it assumes to state the causes of the death of the insured, was required by the contract as a condition of the plaintiff's right to sue on the policy, or whether, under the circumstances of this case, it was proof of all the facts stated in it, it is sufficient to say that the objection that

the court, in effect, discredited that certificate as *prima facie* evidence of the facts stated, cannot be entertained. No one of the requests for instructions submitted by defendant covers the precise point now made, nor was any exception taken, at the time, to that part of the charge which, it is claimed, refers to the certificate of the attending physician. The only exception taken by the defendant to the charge was "to the charge of the eighth proposition, as modified by the court and embraced in his general charge." The eighth proposition submitted by the defendant was given, in the words already quoted from the charge, with the modification, that the jury were to determine, on the evidence, whether the insured had had the before-mentioned attacks of malarial fever, accompanied by cerebral engorgement. That modification was entirely proper, since it was the province of the jury to determine the weight of the evidence. *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 77. If the subsequent part of the charge, which is now referred to as discrediting Dr. Baner's certificate as evidence of the facts stated in it, was regarded at the trial as a modification of the defendant's eighth proposition, or as objectionable in itself, the exception taken should have been more specific. The attention of the court should have been called to the particular point by something more definite than the general exception taken. *Beckwith* v. *Bean*, 98 U. S. 284; *Lincoln* v. *Clafin*, 7 Wall. 132; *McNitt* v. *Turner*, 16 Id. 362; *Beavar* v. *Taylor*, 93 U. S. 46.

No error was committed in overruling the instructions asked by the defendant, since whatever they contained that ought to have been approved, was embodied in the charge to the jury.

We find no error in the record of which this court can take cognizance, and the judgment must be

Affirmed.

Supreme Judicial Court of Massachusetts.

COMMONWEALTH v. POMPHRET.

If a club of men *bona fide* buy and own in common a stock of liquors, to be delivered by their steward only to actual members upon receipt of checks previously obtained from him at five cents each, such a delivery to a member for such checks, *bona fide* made, is not an illegal sale by such steward, and he is not indictable for unlawfully keeping liquors with intent to sell.

THIS was a complaint for unlawfully keeping liquor with intent to sell. Defendant was a member of a club of about one hundred

and fifty persons, which was organized several weeks before the seizure, for the purpose of furnishing its members with refreshments. The club had the usual officers, and employed defendant as steward, paying a certain sum per month for his services and for the use of the room where the liquors were found. Each member upon joining the club paid an admission fee of one dollar, and received certificate of membership. The money so obtained was used in buying a variety of liquors in the name and as the property of the club. Checks were printed, each representing five cents, and the steward was required to furnish these checks to members in such numbers as they were called for, at the rate of five cents each. The steward took care of the liquors of the club, delivered them to members as called for and received the price in checks. The liquors seized were the property of the club, obtained and designed to be used under the above arrangement, and were in his custody as steward.

At the trial below defendant asked the court to rule that there was no evidence to warrant a conviction. The court declined so to rule, but instructed the jury that, "if an association of persons, of whom the defendant was one, owned a quantity of intoxicating liquors which they kept under an arrangement to furnish them in such quantities as might be required, to be drunk on the premises, to such members of the association as should call for them in return for checks which represented certain designated values, and which were obtained from the defendant as a steward of the association, and were paid for, when obtained, at a price which they purported to represent, and the defendant was one of the persons keeping these liquors for said purpose, and was personally in charge of them, furnishing them in return for said checks, the jury may find that said liquors were kept by him for unlawful sale."

A verdict of guilty was returned, and with defendant's consent the case reported to this court.

Edgar J. Sherman, Atty.-Gen., for the Commonwealth.

J. B. Carroll, for defendant.

FIELD, J.—The instructions given in their application to the facts in evidence do not seem to us to differ materially from the instructions which were held erroneous in *Commonwealth* v.

Smith, 102 Mass. 144, except, in that case, the court below ruled that the facts supposed "would be a sale by the defendant," and in this case the court ruled that from the facts supposed "the jury may find that said liquors were kept by" the defendant "for unlawful sale." This change in the ruling may have been made for the purpose of meeting the suggestion found in the opinion in *Commonwealth* v. *Smith*, that the arrangement described "may have been a mere evasion of the law" which "would be a question not of law but fact, and would fall wholly within the province of the jury."

The legislature within the limitations of the constitution can prohibit, under a penalty, any acts it sees fit. The meaning of the statutes must be determined by construction, and criminal statutes are to be construed strictly, although the whole scope of the statutes must undoubtedly be considered. The legislature by the Pub. Sts. c. 100, sect. 1, has prohibited the "selling, or exposing or keeping for sale spirituous or intoxicating liquors," except as authorized in that chapter. It has not undertaken to prohibit the drinking or buying of intoxicating liquors; or the distribution of it in severalty among persons who own it in common. If, therefore, two or more persons unite in buying intoxicating liquor, and then distribute it among themselves they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statutes, they still act with impunity, because what they do is not prohibited by the statute. The evasion of the law intended in *Commonwealth* v. *Smith*, is an evasion by means of a form or device which is apparently legal, while the substance of what is done is within the prohibition of the statute.

In that opinion it is said, "If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some other person than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the whole transaction were a lending of money to the

defendant that he might buy intoxicating liquors to be afterwards sold and charged to his associates, or if he was authorized to sell or did sell or keep any of the liquors with intent to sell to any persons not members of the club, he might well be convicted." The previously arranged system referred to was similar in many respects to that in the case at bar.

The word "club" has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy; and the sale of what might be called a temporary membership in the club with a sale of the liquors would not substantially change the character of the transaction. One inquiry always is whether the organization is *bona fide*, a club with limited membership into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club; or whether, either the form of a club has been adopted for other purposes with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create or a mere name has been assumed without any real organization behind it.

The decisions of other courts which are pertinent, undoubtedly turn more or less upon the particular language of the statute construed. *Gruff* v. *Davis*, 8 Q. B. D. 375, was decided on the ground that there was no transfer of the general or absolute property, but a transfer of a special interest, as all the members of the club were owners in common, and that as the club was *bona fide* a club, the furnishing of liquors to a member was not a sale within the meaning of the English Licensing Act of 1872. *Sein* v. *State*,

55 Md. 567, was decided upon the same general ground. In *Richart* v. *People*, 79 Ill. 85, the court say that "The whole thing is a subtle artifice planned with a view to avoid the penalties denounced against persons violating the law." "The proposition is absurd that the ticket-holders really owned the liquors with which the bar was stocked." The court also say that if the theory of the defence were adopted, "the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members or partners at retail, without a license to keep a dram shop, than a mere stranger would have." "But the alleged association is a mere fiction." "The statute makes the giving away of intoxicating liquors, or other shift or device to evade its provisions unlawful selling." "It was a question of fact whether the association was a mere shift or device to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached." In *Marmont* v. *State*, 48 Ind. 21, it was distinctly decided that the delivery by the club or society through its agents, of beer which was the common property of the society, to a member of the society, upon credit or for cash, and which thereby became the separate property of the members was a sale within the meaning of the Indiana statute of 1873. *State* v. *Mercer*, 32 Iowa 405 resembles *Marmont* v. *State*. To the same effect is *Martin* v. *State*, 59 Ala. 34.

The decision in the case at bar is not to be governed wholly by any general definition of the words "sale" or "selling." After the decision in *Commonwealth* v. *Smith*, the St. of 1875, ch. 99 was passed, which is the foundation of those provisions in the Pub. Sts., c. 100, under which this complaint was made. Nothing is contained in that act or in any subsequent acts which in terms relates to clubs until the St. of 1881, c. 226, was passed. The provisions of the public statutes prohibiting the selling or exposing or keeping for sale of spirituous or intoxicating liquors, except those derived from St. 1881, c. 226, are similar to those contained in St. 1868, c. 141, which were construed in *Commonwealth* v. *Smith*. The statute of 1881, c. 226, is perhaps broader in its terms than was necessary to accomplish its apparent purpose, because no doubt has been expressed that a selling of intoxicating liquors by a club to persons who are not members is an illegal sale under other statutes unless the club is duly licensed to make the sale. The in-

tention of this statute, however, plainly is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses, and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes. It must be assumed that the decision in *Commonwealth* v. *Smith* was known to the legislature at the time the existing statutes were passed. The inference is, that the legislature intended that unlicensed clubs in cities and towns whose inhabitants vote to grant licenses must be dealt with according to the construction given by this court to statutory provisions similar to those in existing statutes prohibiting the sale, exposing or keeping for sale of intoxicating liquors.

The ruling and instruction in this case seems to us to assume that this was *bona fide* a club; that the liquors were owned in common by the members; that they were furnished only to members; and that they were kept by the defendant as one of the members and as steward of the association. It does not appear in the exceptions in what manner new members were admitted, except that they paid an admission fee of one dollar, but we cannot assume that any person could join the association at his pleasure, and the ruling and instruction are not put upon the ground that there was evidence that this was an association open to everybody at a price. On the assumption upon which we understand the instructions proceed we think that under the decision in *Commonwealth* v. *Smith* it was not competent for the jury to find the defendant guilty.

New trial granted.